

# Nursing homes and urban development

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## 1. ELDERLY HOUSING

### 1.1. Data

Demographic research shows that the world's population is ageing, although not at the same rate in all countries. In Spain, the population aged 65 and older (“older adults” or “seniors”) amounts to 19.4%, but in 2029 it will increase to 24.9% and in 2066 it will rise to 34.6%.<sup>377</sup> These are very telling data, particularly considering the significant increase in the population *aged 80 or over*. In 2016, 6% of the population were eighty-year-olds. According to the estimates, this percentage will increase to 7% in 2026 and 18% in 2066.<sup>378</sup> Such a demographic trend, related to the so-called “old-old,” “oldest old” or “super old,” is decisive for housing policymaking and particularly for assisted living facilities and nursing homes.<sup>379</sup> Indeed, the “super old” often lose personal autonomy as they age, thus requiring assisted living care or other forms of assistance or support.

Seniors over 65 usually live at their *lifetime home*. Also, most of them (89.3%) own that home, usually relying on mortgage loans. Persons at *assisted living facilities* only amount to 4% overall.<sup>380</sup> According to 2019 estimates, 322,180 people aged 65 and older were permanently living at nursing homes and similar facilities.<sup>381</sup> Nevertheless, after breaking

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<sup>377</sup> Spanish National Statistics Institute (INE), *Proyección de la Población de España 2014–2064* ([www.ine.es](http://www.ine.es)).

<sup>378</sup> ANTONIO ABELLÁN GARCÍA, ALBA AYALA GARCÍA, ROGELIO PUJOL RODRÍGUEZ (2017), “Un perfil de las personas mayores en España, 2017. Indicadores estadísticos básicos,” *Informes envejecimiento en red*, no. 15, p. 29.

<sup>379</sup> FRANCISCO VELASCO CABALLERO (2018), “Envejecimiento demográfico y Derecho urbanístico,” *Indret*, no. 4/2018, p. 1-55 (p. 3).

<sup>380</sup> ANTONIO ABELLÁN GARCÍA, ALBA AYALA GARCÍA, ROGELIO PUJOL RODRÍGUEZ (2017), “Un perfil de las personas mayores en España, 2017...,” *cit.*, p. 46. In Germany, the average is 7% (*Bundesministerium für Verkehr, Bau und Stadtentwicklung, Wohnen im Alter, Schriftenreihe Forschung*, no. 147, p. 27), which is reasonable, since Germany has a slightly higher share of population aged 65 and older (21%).

<sup>381</sup> ANTONIO ABELLÁN GARCÍA, PILAR ACEITUNO NIETO, ISABEL FERNÁNDEZ MORALES, DIEGO RAMIRO FARIÑAS, ROGELIO PUJOL RODRÍGUEZ (2020), “Una estimación de la población que vive en residencias de mayores,” *Envejecimiento en red*, 24 April 2020.

down that figure into age groups, we noticed that most older adults over 80 are institutionalized, i.e., they live permanently at these facilities. Accordingly, within the 65-69 age group, only 4 out of 26 seniors live at nursing homes, whereas in the 85 to 89 segment there are 30 people living at a facility and only 11 who have stayed at their home. These data are further confirmed by the following: on average, 79% of the aged population living at nursing homes or similar facilities (i.e., the institutionalized population) is 80 or older. Thus, it is safe to conclude that, for the “super old,” who are more likely to lose personal autonomy, nursing homes are more of a *need* rather than a choice, and they must be considered as such by every municipality’s urban development and planning. Finally, note that out of the total number of beds at residential facilities for the elderly, 271,696 are *private*, and only 101,289 are public.<sup>382</sup> This public-private ratio has an impact on urban development law, which must ensure that there be both public use and private use plots to enable this public-private duality regarding elderly care.

## 1.2. Housing

The elderly have specific, and not homogeneous, housing needs and priorities. These needs and priorities vary not only depending on age. Mostly, they differ based on the person’s health and degree of dependency. Therefore, housing policies catering to the elderly must be *heterogeneous* or *diverse*. Broadly, there are two alternatives regarding elderly housing and residential needs: (i) *permanence*, i.e., to remain in their home of choice; or (ii) the *break* entailed by moving elsewhere (usually to a nursing home with other older adults).<sup>383</sup> Policymaking in the field of urban development and housing can most certainly help the elderly in staying at their lifetime home. However, urban development and housing policies should not disregard the alternative that seniors move to residential facilities (i.e., the break), particularly for the “super old.”

In the 1960s, environmental gerontology studies advocated that the elderly should be re-accommodated in environments other than their original communities better suited for their specific needs.<sup>384</sup> This is the origin of *nursing homes* (“*residencias*” in Spanish or

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<sup>382</sup> ANTONIO ABELLÁN GARCÍA, MARÍA DEL PILAR ACEITUNO NIETO, DIEGO RAMIRO FARIÑAS (2019), “Estadísticas sobre residencias. Distribución de centros y plazas residenciales por provincia. Datos de abril de 2019,” *Informes Envejecimiento en Red*, no. 24, October 2019, p. 16.

<sup>383</sup> IRENE LEBRUSÁN MURILLO (2019), *La vivienda en la vejez: problemas y estrategias para envejecer en sociedad*, Consejo Superior de Investigaciones Científicas, Madrid, p. 185.

<sup>384</sup> JOSEPH D. TEAFF, M. POWELL LAWTON, LUCILLE NAHEMOW DIANE CARLSON (1978), “Impact of age segregation on the well-being of elderly tenants in public housing,” *Journal of Gerontology*, no. 33, p. 130-133; JOHN L. LEWIS Y ARLENE GROH (2016), “It’s About the People...: Senior’s Perspectives on Age-Friendly Communities,” in THIBAUD MOULAERT AND SUSANNE GARON (Eds.), *Age-Friendly Cities and Communities in International Comparison*, Springer, New York, p. 81-98, p. 84.

“*Pflegeheime*” in German), usually in the outskirts of cities. These gerontological views changed during the late 20<sup>th</sup> century. Gerontologists began to have the older adults’ *original environment* in greater consideration, thus giving rise to the so-called “ageing in place” approach.<sup>385</sup> Consequently, public policies should focus more on accessibility and safety of the older adults’ original homes. Currently, assuming the general “ageing in place” perspective, we emphasize the distinction between the home and the community (the neighborhood), so that the ability to live in one’s own environment does not necessarily mean “ageing at home.” Ageing “in place” can be in a home other than the original or lifetime one, although the urban and social environment must remain the same (“lifetime neighborhoods”). Ageing in one’s own environment mostly refers to the urban space (the neighborhood or the community) where the older adult has led his or her life or part thereof. This is why “ageing in place” can be at homes other than lifetime houses as long as the original social environment remains the same.<sup>386</sup>

In any case, despite that “ageing in place” approaches are widespread and widely accepted, ageing in place policies have some limits. First, there is *choice*, i.e., older adults may decide to live at a nursing home with other seniors or to stay at home living alone. Second, there are *physical needs*: certain impairments can prevent an older adult from living in his or her lifetime home. Third, there could be *income-related* issues: not all seniors have sufficient financial resources available to live independently, otherwise being forced to move to a public residential facility. Consequently, “ageing in place” policies should not be exclusive. Rather, they must leave room for housing alternatives, i.e., moving to a nursing home or an assisted living facility.

In sum, residential homes and facilities for the elderly should never be ruled out as a housing alternative for urban rulemaking, even acknowledging that “ageing in place” should be prioritized. Additionally, decision-makers and rulemakers in the field of urban planning and development should assume that the residential services for the elderly are inherently *diverse*. Nursing homes and facilities do not only vary depending on whether they are public or private. The older adults’ degree of functional ability also plays a role. On this basis, we can differentiate between assisted living facilities and nursing homes.

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<sup>385</sup> HANS-WERNER WAHL AND LAURA N. GITLIN (2007), “Environmental gerontology,” in JAMES BIRREN (editor), *Encyclopedia of Gerontology: Age, Ageing and the Aged*, Elsevier, Oxford, p. 494-501; JON PYNOOS, CHRISTY M. NISHITA, CAROLINE CICERO, R. CARAVIELLO (2008), “Ageing in Place, Housing and the Law,” *The Elder Law Journal*, no. 16, p. 77-105, p. 79; GRACE M.Y. CHAN, VIVIAN W.Q. LOU, LISANNE S.F. KO (2016) “Age-friendly Hong Kong,” in THIBAUD MOULAERT AND SUSANNE GARON (EDS.), *Age-Friendly Cities and Communities in International Comparison*, Springer, New York, p. 121-151 (p. 130); IRENE LEBRUSÁN MURILLO (2019), *La vivienda en la vejez...cit.*, p. 56.

<sup>386</sup> JOHN L. LEWIS AND ARLENE GROH (2016), “It’s About the People...,” cit., p. 84.

First, there are *assisted living facilities* or *senior living homes*, i.e., individual or family dwellings *specifically* designed for the elderly. They are accessible and have friendly and suitable spaces, as well as certain forms of assistance or support for the community as a whole. There are many types of senior living providers worldwide. For instance, Germany has the so-called “*Wohngemeinschaften*” and “*Servicewohnungen*.”<sup>387</sup> Also, it is worth highlighting the “Green House Project”<sup>388</sup> in the US and the “elderly cohousing” alternatives in the United Kingdom.<sup>389</sup> This housing approach is often considered the best for fairly autonomous elders, since they are granted a broad scope of independence (thus securing their individual dignity).<sup>390</sup> In Spain, “elderly homes” or “*viviendas de mayores*” and “sheltered apartments for the elderly” are on the rise, although there are not too many yet.<sup>391</sup> They are all different: some of them resemble separate/independent apartments with little communal assistance, whereas others could be considered similar to traditional nursing homes.<sup>392</sup>

Second, there are *nursing homes*, where older adults live in a community with other seniors. More often than not, they all have the same or similar needs and abilities. Nursing homes can be publicly owned and managed—fully within the regional welfare system—or private. Note that private facilities are steadily becoming more common.<sup>393</sup>

Keeping in mind all of these nuances and specificities is essential, because they have an impact on housing policies and urban development law. Urban planning provisions should most certainly promote “ageing in place” (indeed, the current policies on urban refurbishment do) but they should also foster communal senior living. In fact, urban development legislation

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<sup>387</sup> See the full categorization of elderly housing in Hamburg (including nursing homes) in the local building and planning guidelines (*Bauordnungen*): Bauprüfamt 2/2008: “Besondere Wohnformen für Behinderte und ältere Menschen Bauaufsichtliche Anforderungen.”

<sup>388</sup> K. DAYTON E ISRAEL DORON (2012), “Municipal Elder Law: A Minnesota Perspective,” *The Elder Law Journal*, no. 20, p. 33-70 (p. 67).

<sup>389</sup> LAURA LÓPEZ DE LA CRUZ (2018), “Las viviendas colaborativas para mayores como modelo habitacional para la promoción del envejecimiento activo. Aspectos sociales y jurídicos,” in LAURA LÓPEZ DE LA CRUZ AND JOSÉ ANTONIO SÁNCHEZ MEDINA, *Soluciones habitacionales para el envejecimiento activo: viviendas colaborativas o cohousing*, Tirant Lo Blanch, Valencia, p. 121-159 (p. 137).

<sup>390</sup> ATUL GAWANDE (2014), *Being Mortal. Medicine and What Matters in the End*, Metropolitan Books, New York, p. 79.

<sup>391</sup> In 2003, the city of Madrid only offered 4 buildings including “elderly apartments” (General Directorate for Urban Development Plan Services, *Los equipamientos para mayores en la planificación y gestión urbanística del municipio de Madrid*, 2003, p. 20).

<sup>392</sup> This is the case of “elderly housing” in Castilla La-Mancha, under Articles 10 and 11 of the Order issued by the Regional Welfare Department on 21 May 2001 (Regional Official Gazette, no. 75, 29 June). See LÓPEZ DE LA CRUZ (2018), “Las viviendas colaborativas...,” cit, p. 124.

<sup>393</sup> In 2003, the city of Madrid had 210 nursing homes, and only 15% of them were public (General Directorate for Urban Development Plan Services, *Los equipamientos para mayores en la planificación y gestión urbanística del municipio de Madrid*, 2003, p. 22).

and plans seek to advance “ageing in place” whilst allowing for other *housing and residential alternatives*. This mostly revolves around *land use designations* regarding specific plots, in order for nursing homes or assisted living facilities to be built there.

## **2. CONSTITUTIONAL REQUIREMENTS APPLICABLE TO URBAN PLANNING AIMED AT PROMOTING NURSING HOMES**

Under Articles 47 and 50 of the Spanish Constitution (CE), when making planning, development and zoning decisions, we must strike a fair balance between (i) the constitutional requirement to seek appropriate housing for the elderly; and (ii) other legal interests at stake to be safeguarded.<sup>394</sup> Consequently, since there are constitutional requirements directly applicable to urban planning, land use regulations *must make available* various housing alternatives for the elderly based on their needs. On top of this constitutional requirement regarding nursing homes and other communal facilities, there are additional obligations arising from welfare and housing legislation.

*Welfare* mostly falls within the scope of regional governments. Regional welfare legislation governs specific, customized services and benefits for eligible recipients in need, including dependent persons. What really defines these benefits and services are the recipients or addressees, which may include the elderly.<sup>395</sup> According to welfare legislation, residential homes for the elderly qualify as welfare assistance.<sup>396</sup> Such legal consideration must be included in *urban development and planning rules*. So, if a regional government passes welfare legislation requiring that there be certain nursing homes or sheltered apartments,<sup>397</sup> the local provisions on urban planning should implement this requirement to the extent possible, making available these supplementary residential facilities and alternative housing approaches.

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<sup>394</sup> JOSE MARÍA RODRÍGUEZ DE SANTIAGO (2007), *La administración del Estado social*, Marcial Pons, Madrid-Barcelona, 2007, p. 49.

<sup>395</sup> Art. 20(1) of Madrid Regional Act 11/2003, of 27 March, on Welfare Services; Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; Art. 7(g) of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services; Castilla y León Regional Act 16/2010, of 20 December, on Welfare Services; Art. 20 of Valencia Regional Act 5/1997, of 25 June, on Welfare Services; Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Articles 25(j) and 58(3) of Andalusia Act 9/2016, of 27 December, on Welfare Services; Articles 22, 45(2) of Basque Country Act 12/2008, of 5 December, on Welfare Services.

<sup>396</sup> Art. 18(2) of Madrid Regional Act 11/2003; Art. 31(3) of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León.

<sup>397</sup> Arts. 14 to 18 of Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Art. 1 of Madrid Regional Decree 72/2001, of 31 May, Art. 31 of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; 2<sup>nd</sup> Additional Provision, paragraph (h), of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services; Art. 22 of Basque Country Act 12/2008, of 5 December, on Welfare Services.

Welfare legislation also includes the “principle of solidarity” as one of its guiding principles.<sup>398</sup> Although it is a guiding principle and not a true legal provision binding on local authorities, it encourages and legitimizes urban planning promoting that the costs of elderly assistance be *equally borne by the relevant stakeholders*. These costs can be “socialized” through (i) budgetary allocations (i.e., through public spending relying on tax revenue); and (ii) urban planning instruments. For instance, authorities may *allocate public land* to building public nursing homes relying on the relevant overlays or previous transfers of private plots by stakeholders.

Finally, under welfare law, public benefits and private services must be *complementary*, including the for-profit sector and non-profits.<sup>399</sup> This legal principle requires that urban planning decision-makers combine public land uses (allowing to build public nursing homes) with other land use designations allowing to arrange private facilities. Obviously, there will be a different public-private balance depending on each local government’s political priorities. However, the bottom line is that welfare legislation requires that land use designations enable this complementary or supplementing relationship.

*General housing law* includes two primary constitutional provisions that (i) supplement each other; and (ii) are decisive for urban planning decisions regarding the elderly. These provisions are the *freedom to choose the place of residence* (Art. 19(1) CE) and the guiding principle that everyone, obviously including older adults, be entitled to *dignified housing* (Art. 47 CE).

On an *a priori* basis, everyone is free to choose where to live when they grow old. This entitlement qualifies as a fundamental right to *choose one’s place of residence* or *freedom of residence* enshrined in Art. 19(1) of the Constitution. It should be considered an effective and enforceable right when the right holder (i.e., an older adult) has sufficient financial resources so as to freely make any housing decision. However, this right is not enforceable in practice—i.e., qualifying as a merely formal entitlement—in the absence of sufficient financial resources to choose accommodation. Keep in mind that the provisions governing freedom of residence fail to mention financial aspects, affordability or older adults’ financial

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<sup>398</sup> Art. 1(g) of Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Art. 3(e) of Madrid Regional Act 11/2003, of 27 March, on Welfare Services; Art. 2(e) of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; Art. 5(d) Catalonia Regional Act 12/2007, of 11 October, on Welfare Services.

<sup>399</sup> Art. 7 of Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Art. 3(i) and Articles 55 to 58 of Madrid Regional Act 11/2003, of 27 March, on Welfare Services; Art. 36 of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; Articles 2(1) and 68 to 70 of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services; Articles 34(1)(d) and 35(2) of Basque Country Act 12/2008, of 5 December, on Welfare Services.

situation.<sup>400</sup> Also, general housing law *seeks* that everyone have *dignified housing* or a *dignified home* within the meaning of Art. 47 CE. Having regard to its recent evolution, Art. 47 (construed both as a right and a constitutional principle) comprises *social cohesion* as an inherent aspect of dignified housing,<sup>401</sup> thereby excluding (i) social or subsidized housing *ghettos*; and (ii) the concentration of elderly housing in specific areas of the city. Therefore, even assuming that it qualifies as a guiding principle (not a binding provision), the constitutional dignified housing requirement should preclude any urban planning provisions that directly or indirectly move older adults away from the city or their communities—including land use designations or zoning regulations that provide for moving seniors to nursing homes away from their lifetime environment.

In Spain, traditional housing legislation has relied on *development-oriented* approaches,<sup>402</sup> e.g., financial aid for building and refurbishment works or launching public housing schemes to tackle housing supply or affordability. This remains the essence of Decree 106/2018, of 9 March, governing the National Housing Plan 2018-2021 (*Plan Estatal de Vivienda*, PEV). Note that the PEV expressly states that it will seek to “facilitate appropriate and dignified housing for the elderly (...).” The financial aid scheme includes economic support for (i) establishing and operating nursing homes; (ii) promoting *special* public housing for the elderly on lease (Art. 65 PEV); and (iii) implementing *social housing* programs<sup>403</sup> seeking the social integration of older adults with financial problems.

As shown above, there are major overlaps and interactions between housing law and urban planning. Housing law needs that urban development provisions *make land available* to implement housing programs. Thus, urban plans should (i) designate or allocate suitable plots for the promotion of special elderly housing; and (ii) provide for free transfers of public use land (also known as “land for public interest purposes”) allowing to build houses or public nursing homes for the elderly. Housing law does not specifically provide the location of these plots of land. However, welfare legislation does preclude that older adults be *detached or taken away from their communities*. Therefore, it indirectly prevents that public housing

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<sup>400</sup> Constitutional Court Judgment (STC) no. 28/1999, legal basis 7; HERMINIO LOSADA (2008), “Comentario al artículo 19,” in MARÍA EMILIA CASAS BAAMONDE AND MIGUEL RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, *Comentarios a la Constitución Española*, Fundación Wolters Kluwer España, Las Rozas, p. 460-470 (p. 466).

<sup>401</sup> MARTÍN BASSOLS COMA (2008), “Estudio introductorio: la ley 18/2007, de 28 de diciembre, del Derecho a la Vivienda en Cataluña,” in JULI PONCE SOLÉ AND DOMÉNECH SIBINA TOMÀS (coords.), *El Derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo*, Marcial Pons, Madrid-Barcelona-Buenos Aires, p. 21-48 (p. 27).

<sup>402</sup> JULIO CÉSAR TEJEDOR BIELSA (2010), “Régimen jurídico general de la vivienda protegida” in FERNANDO LÓPEZ RAMÓN (Coord.), *Construyendo el derecho a la vivienda*, Marcial Pons, Madrid-Barcelona-Buenos Aires, p. 309-347 (p. 315).

<sup>403</sup> Arts. 81(1) of the LV-SU; 34(3) of TRC-LU; and Annex IV., paragraph I. 2 LCV-OTUP.

programs for the elderly be carried out in new urban areas away from older adults' lifetime communities.

### 3. URBAN PLANNING REGARDING RESIDENTIAL FACILITIES FOR THE ELDERLY

#### 3.1. Designation of land uses: public land versus private land

A large share of older adults are unable to remain in their home of choice. Usually, at least in Spain, this is not an economic matter, since 89.3% of seniors own a house. Although there certainly are older adults that cannot stay at their home for financial reasons, most commonly it has to do with their loss of personal autonomy. If so, older adults have several *assisted living* alternatives at their disposal: “elderly homes” or “*viviendas de mayores*,” “sheltered apartments for the elderly” and traditional nursing homes. These housing alternatives will actually exist if so provided or allowed by land use regulations and urban plans. Self-evidently, neither legislation nor the plans actually create housing for the elderly, but they can facilitate, and even *encourage* to some extent, the creation of these senior living alternatives. Legislation does so, mostly, by specifically designating and allocating land uses.

Land use designation through urban planning and development rules can either facilitate or hinder that there be residential units for older adults. After examining regional urban planning law, we found that the various pieces of legislation provide non-exhaustive lists of possible land uses, although they barely lay down any rules on the applicability of the existing land uses in each city. Further specifying the applicability of land uses at a local level is left for the cities' local *urban plans*. Broadly, urban development provisions differentiate between “for-profit land uses,” e.g., residential plots, and land “for general interest purposes.”<sup>404</sup> This distinction is widespread but not accurate, because plots of land “for general interest purposes” can be either public or private and the latter can also be “for profit.” Furthermore, the legal boundary between *public* and *private land for general interest purposes* is essential regarding the applicable legal framework for acquiring the land and subsequently allocating building and urbanization costs among landowners within the same area, sector or development unit.

General land use regulation is supplemented, in each municipality, by *land use rules* set out in urban planning provisions (particularly governing the limits on compatible and associated land uses). Finally, each city's general or comprehensive urban plan *allocates* a specific land use to all plots and buildings within the abstract framework provided by the applicable

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<sup>404</sup> JUAN JOSÉ GUARDIA HERNÁNDEZ (2015), “Urbanismo y libertad de enseñanza en la LOMCE: a propósito de la concesión de suelo dotacional público para la construcción de un centro concertado,” *Revista de Derecho Urbanístico y Medio Ambiente*, no. 297, p. 17-39 (p. 21).

legislation and the plan itself. Cities will be more or less age-friendly depending on the (i) land use regulation in legislation and plans; and (ii) each municipality's specific land use designations and allocations.

Urban planning law loosely regulates residential facilities for the elderly. Urban planning provisions grant broad discretion to local governments, allowing them to decide if they lean towards a predominantly public or private housing model. If a given city or municipality wants to encourage private nursing homes, it should plan for sufficient "*private land for general interest purposes*" so as to allow for these private initiatives. But, if local governments want nursing homes and elderly care to be a *public service*, they should allocate sufficient *public land for general interest purposes*. Therefore, urban planning decisions somehow predetermine or show the basic political alternatives when it comes to assisted living for older adults: either as a public service or a private service in the general interest. The potential coexistence of private nursing home plots and land designated for public services can be peaceful or give rise to disputes. The allocation of land for residential purposes under the applicable plan could *encourage private nursing homes*, thereby reducing the plots allocated for public facilities. So far so good, but keep in mind that some citizens will not be able to live in private nursing homes for financial reasons. Conversely, an excess of public land for general interest purposes available to build public nursing homes can make private facilities (built on plots allocated a "for-profit land use") economically unfeasible due to a lack of demand.

### **3.2. Types of land uses supporting residential facilities for the elderly**

Urban plans in place show that there are currently residential homes for the elderly—e.g., assisted living facilities or traditional nursing homes—built on land *for general interest purposes* (whether public or private) and on *residential* plots (allocated a "for-profit" land use). In other words, not every building used for communal senior living facilities qualifies as a "communal facility" for urban development purposes, where "communal facility" means any building for general interest purposes on land specifically allocated for the provision of services for the community, whether by public or private providers.<sup>405</sup>

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<sup>405</sup> MARÍA JOSÉ ROMERO ALOY (2012), "Equipamientos, dotaciones y zonas, por una necesaria clarificación conceptual," *Revista de Derecho Urbanístico y Medio Ambiente*, no. 276, p. 13 to 36 (p. 27). The Sole Additional Provision, paragraph d(5) of Castilla y León Decree 22/2004, of 29 January, approving the General Urban Regulation provides a similar definition of "communal facility" although a little more detailed. Other urban development legal frameworks confuse "plots or buildings for general interest purposes" with "communal facilities," since they define as "communal facilities" certain public areas that do not allow to provide services for the community, such as green and open areas (see Art. 36(2)(b)(1) LM-S).

*Nursing homes* can sometimes be on “communal residential land” or on plots that have been allocated for general interest purposes (“communal facilities”), whether public or private.<sup>406</sup> The definition of these two land uses (residential or for general interest purposes) in the plans is fairly vague and allows for allocating different uses to the same nursing home, depending on perspective.

a) Article 7(3)(2)(b) of the 1997 Madrid General Urban Plan (PGM) defines *communal residential land* as “any plots for the accommodation of groups of people, other than families, with religious, social or similar ties,” which definitely comprises nursing homes. Also, the 1976 Urban Metropolitan Plan of Barcelona (PGMB) refers to “communal housing, such as nursing homes, retirement homes or senior living facilities” as examples of residential land uses (see Art. 277 PGMB).<sup>407</sup> Article 7(4)(2)(c) of the Valencia General Urban Plan has a very similar wording.

b) The land use for *communal facilities*, however, revolves around the services tied or more closely related to the building. These services include residential care for the elderly. Therefore, land use for communal facilities means “any land designation seeking to provide education, cultural, religious and health services,” including residential care for “specific groups (...) like the elderly” (see Articles 7(7)(1)(2)(c); 7(10)(1)(1)(d); and 7(10)(3)(1)(b)(iv) PGM; see also, with a similar wording: Articles 7(8)(3)(d) of the Valencia General Plan; 6(3)(17) PGMB; and 6(6)(2)(2)(c) of the Seville General Plan). The following will also be considered communal facilities: “nursing homes, whether public or private, social or community centers (...)” (Art. 212(1)(b) PGMB). As shown above, both residential land uses and land uses for general interest purposes allow to build nursing homes. Nevertheless, the specific land use designation promotes or facilitates, to a greater or lesser extent, that these nursing homes be built.

### **3.2.1. Residential uses**

Nursing homes or assisted living facilities may be built on plots allocated a *general residential land use* under the local urban plan. So, admittedly, a public or private nursing home can be built on a residential plot, but such specific land use designation is in *economic*

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<sup>406</sup> See, for instance, the privately owned “Residencia Fundación Basílica” in Colmenar Viejo (Madrid) built on two adjacent plots with different land use designations: (i) residential use, with a compatible nursing home use; and (ii) private use for general interest purposes, more specifically, “communal health use.”

<sup>407</sup> NOEMÍ BLÁZQUEZ ALONSO AND JOAQUÍN HERNÁNDEZ TORNIL (2017), “El régimen urbanístico de las residencias de estudiantes: a propósito de su nueva regulación en Barcelona,” *Revista de Derecho Urbanístico y Medio Ambiente*, no. 318, p. 133-151 (p. 139).

*competition* with other residential uses on the same plot.<sup>408</sup> As a result, perhaps (i) there will be no plots actually used to build nursing homes (since it is not the most profitable residential use) or, if nursing homes are built, (ii) it will be at a high opportunity cost that will only be offset by passing it on to the public or private nursing home developers or to the end users of the relevant residential services (i.e., older adults living at assisted living facilities). Both (i) and (ii) above are inefficient options. So, if urban plans intend to promote communal or group housing for the elderly, they should specifically allocate a *more detailed land use* to the plot, e.g., “communal housing (residential use) for the elderly.”

Private residential uses for assisted living facilities include *subsidized housing*, i.e., plots specifically allocated for apartment buildings or units with price caps to make them affordable. As pointed out before, the National Housing Plan 2018-2021 (PEV) encourages subsidized and affordable housing for the elderly. From a strictly urban development perspective, promoting subsidized housing requires that local urban plans have previously allocated and specifically designated sufficient land for this use (i.e., residential use for subsidized or affordable housing), since only this land use designation prevents that land be allocated to more profitable uses.

In a nutshell, if local authorities do not reserve plots for subsidized housing (i.e., preventing any other land uses) and land transfers continue to have a limited scope, subsidized housing units—including special housing for the elderly under the PEV—will not be in consolidated areas of the city and they will be located in new urban developments. From the perspective of freedom of residence, offering special subsidized housing for the elderly is already a successful outcome, even if these affordable housing units are in new urban development areas. However, if all subsidized housing is in newly developed areas (as could be expected) there is no actual freedom of residence for the elderly. Rather, they would be forcefully moved away from their community, as if this was the only option for older adults with functional impairments preventing them from staying at their home of choice.

### ***3.2.2. Land for general interest purposes***

Designating plots as *land for general interest purposes* makes it easier to locate nursing homes. A “general interest purpose” land use designation under urban plans precludes certain “for profit” land uses right away (e.g., general residential uses or commercial uses). This *facilitates* locating nursing homes, because these specific facilities compete with fewer alternative land uses for the same land plot (they are only in competition with other “general

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<sup>408</sup> JORDI VIGUER PONT (2011), “Régimen Jurídico y desarrollo urbanístico de las residencias universitarias,” *Actualidad Jurídica Uría Menéndez*, special issue no. 1, p. 155-162 (p. 162).

interest” land uses). As a result, at least hypothetically, the price of the land plot will be passed on to a lesser extent to the final facility or building.

Aside from the land use designation of a plot as “land for general interest purposes,” we should also focus on whether the relevant general interest purposes will be *public* or *private*. Currently, there is no doubt that there can be private communal facilities, i.e., private general interest purposes.<sup>409</sup> Designating a general interest plot as public or private is important for various reasons. First, the public or private allocation determines subsequent *ownership*—public or private—of the relevant nursing home. Second, it matters for *urban management and development*,<sup>410</sup> given that (i) *public* plots for general interest purposes (at least if such purposes have a local scope) will be transferred for free to the local government by the co-owners of the relevant urban unit (see Art. 18(1)(a) of the Spanish Act on Land Use, TRLS); whereas (ii) *private* plots for general interest purposes will remain private, will not be transferred to the local government and can have private nursing homes.

Moreover, when land plots are designated as *public land for general interest purposes*, we should pay attention to whether such purpose has a *city-wide* or *zonal* scope. In other words, we should check if the projected nursing home is supposed to provide a service to a specific area or sector of the city or to the city as a whole. This distinction becomes important when determining (i) the way of acquiring the relevant plot for general interest purposes and, ultimately, (ii) how to pay for that land.<sup>411</sup> Indeed, the cost of land plots allocated for *city-wide* general interest purposes will be covered with local government funds. In turn, plots allocated for *zonal* purposes (i.e., for a specific neighborhood or area) should be transferred to the municipality for free by the relevant unit’s co-owners. Keep in mind that defining a public plot for general interest purposes as *city-wide* or *zonal* leads to constant disputes,<sup>412</sup>

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<sup>409</sup> ÁNGEL MENÉNDEZ REXACH (2005), “Contra la privatización del dominio público. La naturaleza demanial de los sistemas generales. Comentario a la sentencia del Tribunal Superior de Justicia de Madrid de 6 de octubre de 2004 (Ciudad del Fútbol de Las Rozas),” *Revista Jurídica del Deporte*, no. 13, p. 15-31 (p. 22); FERNANDO LÓPEZ PÉREZ (2013) “Las dotaciones urbanísticas,” in FERNANDO LÓPEZ RAMÓN AND VÍCTOR ESCARTÍN ESCUDÉ (Coordinadores), *Bienes públicos, urbanismo y medio ambiente*, Marcial Pons, Madrid-Barcelona-Buenos Aires-Saô Paulo, p. 49-71, 2013 (p. 58). Clearly: Articles 54(2)(e) and 57(2)(e) LV-SU. On this matter, see: ROSARIO GARCÍA MAZA AND JUAN IGNACIO IZETA BERAETXE (2011), *Manual Básico de Derecho Urbanístico Vasco*, IVAP, Oñati, p. 124. See also: Articles 24 and 37 LCV-OTUP.

<sup>410</sup> IÑAKI LASAGABASTER HERRATE (2008), “Dotaciones públicas, sistemas generales y algunas perversiones del sistema urbanístico,” *Revista Vasca de Administración Pública*, no. 6, p. 35-53 (p. 40).

<sup>411</sup> PATRICIA VALCÁRCCEL (2005), “Introducción a la gestión de las dotaciones públicas, sistemas generales y dotaciones locales: actualidad de la distinción,” *Revista de Derecho Urbanístico y Medio Ambiente*, no. 222, p. 31-62 (p. 55); IÑAKI LASAGABASTER HERRATE (2008), “Dotaciones públicas, sistemas generales...,” cit., p. 41.

<sup>412</sup> Supreme Court Judgments (3<sup>rd</sup> Chamber) of 28 January 2003, 16 December 2005 and 24 June 2015; FRANCISCO JAVIER JIMÉNEZ DE CISNEROS AND JORGE AGUDO GONZÁLEZ (2003), *Expropiación y grandes infraestructuras*, Montecorvo, Madrid, p. 24; PATRICIA VALCÁRCCEL (2005), “Introducción a la gestión...,” cit., p. 45; FERNANDO LÓPEZ PÉREZ (2013) “Las dotaciones urbanísticas,” cit., p. 55.

since it depends on a wide variety of aspects, ranging from the plot's and the city's surface area to the public policy objective pursued by the public land allocation. Regarding public nursing homes, due to cities' geographic and demographic diversity, a single facility can suffice to cover the needs and demand of a small city. In this case we would be dealing with a *city-wide* allocation. Nevertheless, nursing homes in larger cities clearly cover specific neighborhoods or areas of the city. Thus, in practice, public elderly facilities will sometimes be subject to *city-wide* allocations and others to *zonal* land use allocations.

Public nursing homes can be built wherever urban plans designate a plot as land for "housing for general interest purposes" (as in the Basque Country urban development provisions); "public housing in the general interest" (as worded in the Catalonia regional legislation); or "permanent housing on lease" (under the Valencia regional provisions). The recipients or addressees of these housing programs are not the elderly *per se*, but older adults in need, whether permanently or temporarily.<sup>413</sup> In any case, this housing is definitely assistance-based, and therefore it should qualify as *public housing* or *public service housing*.<sup>414</sup> The city's public land for general interest purposes can only be used for residential purposes if such residential purposes are assistance-based. These residential units can be built by (i) a *public entity* (a public housing company);<sup>415</sup> or (ii) *private construction companies*, subject to a public works contract or works concession. Note that in the latter case the concessionaire will subsequently manage or operate the elderly care services and assistance provided in such residential facilities (see Art. 14 of the Spanish Public Procurement Act, LCSP). This shows that the specific land use designation as "public land for general interest purposes"—thus suitable for a public assisted living facility for the elderly—does not predetermine the management approach regarding the subsequent public service. Management can be both direct and *indirect*, and subject to a contract (a service contract or a public service concession) or to an arrangement or *concierto*. Accordingly, a contractor (or a non-profit organization) may provide the assistance and care services inherent to "elderly housing for general interest purposes."

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<sup>413</sup> Art. 17 LV-SU and Art. 16 of Basque Country Decree 123/2012, of 3 July, on Urban Development Standards; Art. 3(j) of Catalonia Act 18/2007, of 28 December, on the Right to a Home; section 2(1)(c) of Annex IV of Valencia Act 5/2014, of 25 July, on Territorial Planning and Zoning. Other statutory provisions generally refer to social housing, without further specifying land use designations. See Articles 36(2)(b) 2 LM-S and 38(1)(d) LCL-U.

<sup>414</sup> JULI PONCE SOLÉ (2008), "La provisión de viviendas destinadas a políticas sociales como servicio de interés general. Servicio público y viviendas dotacionales," in JULI PONCE SOLÉ AND DOMÉNECH SIBINA TOMÀS (coords.), *El Derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo*, Marcial Pons, Madrid-Barcelona-Buenos Aires, p. 177-216.

<sup>415</sup> As for Albacete, the public housing company build and manages 17 elderly housing units. The 2017-2019 Madrid Action Plan includes, as specific actions to be implemented, "building sheltered housing enabling an autonomous life for as long as possible" (p. 47, section 2.2.3).

### 3.3. Land use flexibility

In broad terms, both public and private nursing homes and assisted living facilities are encouraged through a flexible land use framework<sup>416</sup> and urban development legislation. So, public and private landowners are entitled to have their land re-designated (from “residential,” “commercial” or “for general interest purpose” land uses) to “land for nursing homes or elderly facilities” solely subject to (i) a permit issued by local authorities; or (ii) an affidavit or sworn statement. Such land use flexibility *significantly decreases conversion or transformation costs*, thereby incentivizing new locations for new nursing homes. This flexibility can be achieved by assigning many *compatible land uses* under the local urban plan.

General or specific urban plan provisions already enable certain *compatibilities*. Some plans broadly allow for overlays (e.g., replacing a residential land use designation with a general interest purpose designation; see Articles 12(2)(24) and 12(4)(13)(4) of the Seville General Plan), but others are more restrictive. Plans tend to cap compatible uses. These caps are expressed as percentages or ratios of buildable areas that can be allocated compatible uses. For instance, in Madrid or Valencia, “ancillary” compatible uses can cover up to 50% of the plot’s built or developed area<sup>417</sup> (Art. 6(6)(4)(k-1) of the Valencia General Plan). There are more stringent restrictions on the so-called “alternative” compatible uses (in Madrid, they cannot exceed 25% of the buildable area). Other plans require that the relevant compatible use apply to a whole building (see Art. 6(28)(4)(h) of the Valencia General Plan). High compatibility ratios encourage to build new nursing homes on urban plots (see Articles 6(3), paragraphs 36 and 37 of the PGMB). For example, they encourage that new nursing homes be located in buildings that were originally conceived for single-family dwellings or apartments. However, the architectural and constructive specificities of nursing homes can make it hard to locate them even where the plan designated a compatible land use.

Promoting nursing homes through a flexible or loose land use framework only makes sense, from an “ageing in place” approach, regarding plots and buildings located in areas designated for *residential buildings*. However, such compatibility will be meaningless if the land is mainly allocated for commercial or industrial purposes. Commercial or industrial land uses create areas with barely any homes or no residential units whatsoever. Thus, flexible land use

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<sup>416</sup> It is similar in Germany, regarding § 3.4 *Baunutzungsverordnung-BauNVO* (Land Use Regulation) of 26 June 1962: GERRIT MANSSEN (2013), “Das Recht der Älteren im Planungs- und Baurecht,” in ULRICH BECKER AND MARKUS ROTH, (eds.), *Das Recht der Älteren*. De Gruyter, Berlin, p. 495-505 (p. 503).

<sup>417</sup> Article 7(2)(8)(1) of the PGM provides for a maximum buildable area of 15% for a new authorized land use (after the plan has been modified), and requires that the new compatible use “should neither distort nor interfere with the proper operation and safety of the general interest activities conducted therein.”

designations (i.e., increasing compatible land uses) could defeat the purpose of elderly-related provisions: it could lead to the moving of older adults to nursing homes located in obsolete and non-profitable commercial areas (which could rely on such land use compatibility to try to make a profit). As stated before, elderly-related welfare legislation promotes ageing *in place*, not elsewhere (and particularly not in new, non-residential locations).

Land use flexibility can also affect plots allocated for *general interest purposes*, whether public or private. Plans allow for these plots or buildings to include additional ancillary or alternative land uses, although subject to stringent restrictions. Currently, *the replacement of land uses* is limited both when the replacement involves two different general interest uses and, particularly, when a general interest use plot is to be re-designated as residential land (see Art. 7(2)(8)(3) PGM).

a) Actually, urban plans *protect general interest designations*, which are in the general interest of residents (pun intended), by restricting the possibility of replacing these general interest designations with other general interest purpose designations. Some urban plans (see Art. 6(6)(2)(2) of the Seville General Plan) do have a broader scope when it comes to alternative land uses, but others only allow replacements involving same-level general interest uses, and sometimes not even for all general interest purposes. For instance, in Madrid it is permitted to fully replace a “sports use” with a “green area designation,” but not with “communal facilities” (see Art. 7(7)(4)(2)(a) PGM), which is one of the land use categories allowing to build nursing homes. As residents in certain neighborhoods age, such stringent restrictions on the replacement of general interest uses can make it hard to adapt the city. Let us think, for instance, in land plots designated for school areas. If a neighborhood or area ages a lot, it will be unnecessary to provide for land plots used to build schools, but it will be essential to have nursing homes.

b) The applicable provisions impose even more stringent restrictions when it comes to re-designating a non-residential plot or building allocated for general interest purposes turning it into a *communal residential use* (e.g., for a nursing home). This is (i) because the newly designated land use supplements the original (main) land use designation and therefore cannot cover the whole plot or building for being ancillary; or (ii) because enforcing this new land use designation requires to amend the applicable urban plan. From this perspective, a way of adapting neighborhoods to ageing processes would be to have plans provide for residential land uses fully interchangeable, with no caps, with general interest plots for schools, culture or sport uses.